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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

BRANDYN MICHAEL SCOTTO,

Defendant and Appellant.

G057318

(Super. Ct. No. 17NF3567)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Nancy E. Zeltzer, Judge. Affirmed.

Richard L. Fitzer, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Susan Sullivan Pithey, Assistant Attorney General, Kenneth C. Byrne and Gregory B. Wagner, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant Brandyn Michael Scotto was alleged to have aided and abetted in what started out as shoplifting, but turned into an *Estes* robbery,¹ followed by recklessly evading authorities. He pleaded guilty to misdemeanor hit and run with property damage (Veh. Code, § 20002, subd. (a); count 3) and misdemeanor driving under the influence of drugs (Veh. Code, § 23152, subd. (f); count 4). At trial, he was convicted of *attempted* second degree robbery (Pen. Code, §§ 664, subd. (a), 211, 212.5, subd (c); count 1)² and felony reckless evading (Veh. Code, § 2800.2; count 2). Defendant admitted a prior strike (§§ 667, subds. (d) & (e), 1170.12, subds. (b) & (c)(1)), a prior serious felony (§ 667, subd. (a)(1)), and four prior prison terms (§ 667.5, subd. (b)). The court sentenced defendant to four years in prison on counts 1 and 2, to run concurrently, which was double the midterm because of the prior strike. It sentenced defendant to a concurrent 6 months in county jail on counts 3 and 4. The court stayed the enhancements for the prior serious felony and four prior prison terms.³ The result was a total prison sentence of four years.

We have, for the most part, already addressed this appeal in *People v. Robins* (2020) 44 Cal.App.5th 413 (*Robins*), which involved a codefendant who was tried with defendant. Defendant and Robins were convicted of an attempted *Estes* robbery on a theory of aiding and abetting under the natural and probable consequences doctrine. In short, defendant was the driver of a getaway vehicle while another of his codefendants went into a retail store to steal merchandise. The thief pushed a loss prevention officer on the way out. Defendant then led the police on a reckless, high speed chase before being caught. At the preliminary hearing, the People, who neglected to present the

¹ *People v. Estes* (1983) 147 Cal.App.3d 23.

² All statutory references are to the Penal Code unless otherwise stated.

³ We are informed that the court later recognized this was an illegal sentence and instead struck the enhancements.

testimony of the loss prevention officer, only managed to establish probable cause for an attempted *Estes* robbery, which was then tried to a jury. The evidence at trial showed a completed *Estes* robbery. A complete statement of facts can be found in *Robins, supra*, 44 Cal.App.5th 413.

The principal issue on appeal is whether attempted *Estes* robbery exists as a crime, or whether, as defendant would have it, attempted *Estes* robbery is a logical impossibility. His codefendant raised the exact same argument in *Robins*. We concluded attempted *Estes* robbery is a valid charge. (*Robins, supra*, 44 Cal.App.5th at p. 421.) That holding is controlling here as well.

Defendant also contends there was no substantial evidence to support a charge of aiding and abetting the robbery. However, codefendant Robins made the exact same argument on the exact same evidence. The only difference between defendant's and Robins's involvement is that defendant was the driver of the vehicle, and Robins a passenger. (*Robins, supra*, 44 Cal.App.5th at p. 417.) Otherwise, their conduct and involvement were identical. We concluded the evidence supported the verdict as to Robins. (*Id.* at p. 423.) It follows that the evidence supports the verdict as to defendant as well.

The only new issue defendant raises is whether the court should have considered his ability to pay in deciding whether to assess fines and fees under *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*). We conclude that defendant forfeited that argument by not raising it in the trial court.

Dueñas was filed on January 8, 2019. The sentencing here occurred on January 28, 2019. The court imposed a \$300 restitution fine, a \$300 parole fee (which was suspended), a \$160 court operations fee, and a \$120 criminal conviction assessment fee. Defendant did not object based on his ability to pay, nor put on any evidence of such. The court did, however, find he was not presently able to pay the costs of the probation report, which was \$2,762.17.

The law is settled that a “defendant’s failure to challenge the fees in the trial court precludes him from doing so on appeal.” (*People v. Aguilar* (2015) 60 Cal.4th 862, 864; see *People v. Avila* (2009) 46 Cal.4th 680, 729 [failure to challenge restitution fine in trial court based on ability to pay forfeits issue for appeal].) Defendant describes *Dueñas* as “game changing” and “dramatic,” and, indeed, it was. And for that reason, we are confident that defense attorneys around the state were well aware of *Dueñas* three weeks after the decision. Accordingly, this case is distinguishable from the cases that have excused the failure to object to fines and fees where the sentencing occurred prior to the filing date of *Dueñas*. (See, e.g., *People v. Castellano* (2019) 33 Cal.App.5th 485, 489.) Defendant’s failure to challenge the fees and fines at trial forfeited the issue for appeal.

DISPOSITION

The judgment is affirmed.

IKOLA, J.

WE CONCUR:

O’LEARY, P. J.

MOORE, J.